

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN MONTUE,

Petitioner,

No. CIV-S-05-0935 LKK JFM P

vs.

TERESA A. SCHWARTZ, et al.,

Respondents.

ORDER AND

FINDINGS & RECOMMENDATIONS

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and a motion for leave to proceed in forma pauperis.

Examination of the in forma pauperis affidavit reveals that petitioner is unable to afford the costs of suit. Accordingly, the request for leave to proceed in forma pauperis will be granted. See 28 U.S.C. § 1915(a).

The court's records reveal that petitioner has previously filed an application for a writ of habeas corpus attacking the conviction and sentence challenged in this case. The previous application was filed on February 28, 1991, and was denied on the merits on October 19, 1995. Before petitioner can proceed with the instant application he must move in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider the application. 28 U.S.C. § 2244(b)(3). Therefore, petitioner's application must be

1 dismissed without prejudice to its refiling upon obtaining authorization from the United States
2 Court of Appeals for the Ninth Circuit.

3 In accordance with the above, IT IS HEREBY ORDERED that petitioner's May
4 12, 2005 motion to proceed in forma pauperis is granted; and

5 IT IS HEREBY RECOMMENDED that this action be dismissed without
6 prejudice. See 28 U.S.C. § 2244(b).

7 These findings and recommendations are submitted to the United States District
8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
9 days after being served with these findings and recommendations, petitioner may file written
10 objections with the court. The document should be captioned "Objections to Magistrate Judge's
11 Findings and Recommendations." Petitioner is advised that failure to file objections within the
12 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
13 F.2d 1153 (9th Cir. 1991).

14 DATED: May 31, 2005.

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17 UNITED STATES MAGISTRATE JUDGE

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